

1 BINGHAM MCCUTCHEN LLP  
John D. Pernick (SBN 155468)  
2 john.pernick@bingham.com  
Amy G. June (SBN 218610)  
3 amy.june@bingham.com  
Three Embarcadero Center  
4 San Francisco, CA 94111-4067  
Telephone: 415.393.2000  
5 Facsimile: 415.393.2286  
Email: john.pernick@bingham.com

6 Attorneys for Defendants  
7 Barclays Capital Inc., Deutsche Bank Securities  
Inc., J.P. Morgan Securities, Inc., and  
8 Oppenheimer & Co., Inc.

9  
10 UNITED STATES DISTRICT COURT  
11 CENTRAL DISTRICT OF CALIFORNIA  
12 SOUTHERN DIVISION

13 In re Stec, Inc. Securities Litigation,  
14

15 This Document Relates To:

16 All Actions  
17  
18  
19  
20  
21  
22  
23  
24

Lead Case No. 8:09-cv-01304-JVS  
(MLG)

**REPLY MEMORANDUM OF  
POINTS AND AUTHORITIES  
IN SUPPORT OF  
UNDERWRITER  
DEFENDANTS' MOTION TO  
DISMISS THE  
CONSOLIDATED AMENDED  
COMPLAINT**

Judge: Hon. James V. Selna  
Court: 10C  
Date: January 10, 2011  
Time: 1:30 p.m.

1     **I.     INTRODUCTION**

2             Plaintiffs fail in their attempt to lower the bar for themselves by  
3     insisting that they are exempt from the heightened pleading requirements of Fed.  
4     Rule Civ. P. 9(b) with regards to their Securities Act claims against the  
5     Underwriter Defendants. Each of Plaintiffs' causes of action relies on the same  
6     factual allegations against all defendants. All of Plaintiffs' claims are premised on  
7     the allegation that the "fraud" was designed to inflate the price of STEC's stock so  
8     that insiders could sell at the inflated price. Plaintiffs' Section 11 and 12 claims  
9     are based on allegedly false statements in the very Registration Statement through  
10    which those insiders sold their stock. Thus, Rule 9(b) applies to claims against all  
11    defendants for all claims in the Consolidated Amended Complaint ("CAC"),  
12    including those claims levied against the Underwriter Defendants. Because  
13    Plaintiffs have not and cannot meet Rule 9(b)'s pleading requirements, their claims  
14    must be dismissed.

15    **II.    BECAUSE THE CAC ALLEGES A "UNIFIED COURSE" OF**  
16    **FRAUDULENT CONDUCT, PLAINTIFFS MUST PLEAD FACTS**  
17    **SUFFICIENT TO SATISFY RULE 9(B) FOR ALL CLAIMS**  
18    **AGAINST ALL DEFENDANTS**

19             Where the same course of conduct is the basis of both fraud and non-  
20    fraud claims, the Ninth Circuit applies Rule 9(b)'s heightened pleading  
21    requirements to the **entire complaint**. *See Rubke v. Capitol Bancorp Ltd.*, 551 F.  
22    3d 1156, 1161 (9th Cir. 2009) ("*Rubke*") (relying upon *Daou* and *Vess*, and finding  
23    that where "exact same factual allegations" complaining of fraudulent conduct also  
24    support a second cause of action, the entire complaint sounds in fraud); *In re Daou*  
25    *Sys., Inc.*, 411 F. 3d 1006, 1027 (9th Cir. 2005) ("*Daou*") (relying upon *Stac*,  
26    reaffirming that Rule 9(b) applies where the complaint alleges and relies upon "a  
27    unified course of...conduct"); *Vess v. CibaGeigy Corp.*, 317 F. 3d 1097, 1103-04  
28    (9th Cir. 2003) ("*Vess*") (Where a plaintiff alleges a course of fraudulent conduct  
and relies "on that course of conduct as the basis" for his claims, fraud and

otherwise, then those claims are “said to be ‘grounded in fraud’ or to ‘sound in fraud,’ and the pleading...**as a whole** must satisfy the particularity requirement of Rule 9(b).” (emphasis added)); *In re Stac Elecs. Sec. Litig.*, 89 F. 3d 1399, 1404-05 (9th Cir. 1996) (“*Stac*”) (holding that Rule 9(b) applies where claims are “grounded in fraud,” meaning that “the gravamen of the complaint is plainly fraud” and there is no “other basis” for the Section 11 claims.); *accord Cozzarelli v. Inspire Pharm. Inc.*, 549 F. 3d 618, 629 (4th Cir. 2008) (holding that Securities Act claims “sounded in fraud” where both Securities Act and Exchange Act claims relied on the same factual allegations); *Borsellino v. Goldman Sachs Group, Inc.*, 477 F. 3d 502, 507 (7th Cir. 2007) (citing *Daou* for the proposition that “Rule 9(b) applies to averments of fraud, not claims of fraud, so whether the rule applies will depend on the plaintiffs’ factual allegations.”); *Rombach v. Chang*, 355 F. 3d 164, 171 (2d Cir. 2004) (holding that “same course of conduct that would support a Rule 10b-5 claim may as well support a Section 11 claim or a claim under Section 12(a)(2). So while a plaintiff need allege no more than negligence to proceed under Section 11 and Section 12(a)(2), claims that do rely upon averments of fraud are subject to the test of Rule 9(b).”); *Stephenson v. Hartford Life & Annuity Ins. Co.*, No. 02 C 3917, 2003 WL 22232968, at \*6 (N.D. Ill. Sept. 26, 2003) (applying Rule 9(b) to all claims because although “framed under distinct legal theories, ... [they] all emanate from the same factual allegations”).

District courts sitting in California since *Rubke* have followed suit, consistently applying Rule 9(b) to the entire complaint, and to all defendants, where the same facts underlie both fraud and non-fraud claims. *See, e.g., Ferrington v. McAfee, Inc.*, 2010 WL 3910169 at \*5 (N.D. Cal., October 10, 2010) (quoting *Rubke* and citing *Vess* and applying Rule 9(b) to all claims, including non-fraud claims); *In re Bare Escentuals, Inc. Sec. Litig.*, 2010 WL 3893622 at \*13 (N.D. Cal. Sept. 30, 2010) (citing *Stac*, *Vess*, *Daou* and *Rubke* and applying Rule 9(b) to all claims); *Salameh v. Tarsadia Hotels*, 2010 WL 2839013 at \*8

1 (S.D. Cal. July 20, 2010) (citing *Vess* and *Rubke* and applying Rule 9(b) to all  
2 claims).

3 The teaching of *Stac*, *Vess*, *Daou*, and *Rubke* is that the nature of the  
4 alleged conduct, the “gravamen,” determines if a complaint sounds in fraud, not  
5 the nature of the claims themselves. *Rubke* leaves no doubt that Rule 9(b) applies  
6 if the same factual allegations support both Section 11 and Section 10(b) claims:  
7 where the “complaint employs the exact same factual allegations to allege  
8 violations of section 11 as it uses to allege fraudulent conduct under section  
9 10(b)...we can assume that it sounds in fraud.” *Rubke*, 551 F. 3d at 1161.

10 Here, the **entire CAC** “sounds in fraud” and the **entire CAC** is  
11 subject to the heightened pleading requirements of Rule 9(b). Plaintiffs ask this  
12 court to radically depart from Ninth Circuit precedent and, “irrespective of whether  
13 the Court holds that the heightened pleading standard should apply to the  
14 Securities Act claims that Plaintiffs assert against the STEC Defendants” find that  
15 “that standard should not apply to the claims that Plaintiffs assert against the  
16 Underwriter Defendants.” Opposition to the Underwriters’ Motion to Dismiss  
17 contained in the Notice of Joinder and Joinder to Motion to Dismiss the  
18 Consolidated Amended Complaint (“Opposition”) at 1. However, none of the  
19 arguments made, or cases cited, by Plaintiffs in their Opposition, provides any  
20 justification for such a departure from the recently clarified and thereafter  
21 consistently followed Ninth Circuit authority described above.

22 Plaintiffs’ Opposition relies entirely upon four district court cases, all  
23 four of which were decided before *Rubke* made very clear that Rule 9(b) applies to  
24 the **entire complaint** where the same factual allegations support both Securities  
25 Act and Exchange Act claims. *See Rubke*, 551 F.3d at 1161; *see also e.g. In re*  
26 *Bare Escentuals, Inc. Sec. Litig.*, 2010 WL 3893622 at \*13 (N.D. Cal. Sept. 30,  
27 2010) (citing *Rubke*, *Vess* and *Daou* and finding that the complaint “sounds in  
28 fraud” because it “employs the exact same factual allegations to allege violations

1 of section 11 as it uses to allege fraudulent conduct under section 10(b)...”).  
2 Nothing in this rule, or in the logic or reasoning underlying it, suggests that it  
3 would be at all appropriate to treat the claims against the Underwriter Defendants  
4 any differently than the claims against the other defendants in this action.

5 Plaintiffs have cited no recent cases (and certainly none decided post-  
6 *Rubke*) in which Securities Act (i.e. non-fraud) claims against an underwriter  
7 defendant were subject to the lower Rule 8(a) pleading standard despite a finding  
8 that, otherwise, the complaint was “grounded in fraud” and subject to the  
9 heightened pleading standard of Rule 9(b), and to the best of our knowledge and  
10 investigation, no such case exists. To the contrary, recent district court cases in the  
11 Ninth Circuit routinely apply Rule 9(b) to Securities Act claims against  
12 underwriter defendants even where, as here, no “fraud” (e.g. Exchange Act) claims  
13 are levied against the underwriters themselves. *See, e.g. In re Seracare Life*  
14 *Sciences, Inc. Sec. Litig.*, 2007 WL 935583 at \*13-14 (S.D. Cal. March 19, 2007)  
15 (where the only claim brought against underwriter defendants was under § 11 and  
16 Rule 9(b) nonetheless applied); *Central Laborers Pension Fund v. Merix Corp.*,  
17 2005 WL 2244072 at \*8 (D. Or. Sept. 15, 2006) (applying Rule 9(b) to all  
18 Securities Act defendants, including underwriter defendants, without regard to the  
19 fact that no Exchange Act fraud claims were levied against underwriter defendants)  
20 reversed and remanded by *In re Merix Corp. Sec. Litig.* 275 Fed. Appx. 599 (9th  
21 Cir. 2008) (reversed on the ground that fraud was not an element of *any* claim  
22 raised in the complaint and, thus, the facts alleged in the complaint did not “sound  
23 in fraud” and the complaint as a whole was not required to comply with the  
24 heightened pleading requirements of 9(b)).<sup>1</sup>

25 \_\_\_\_\_  
26 <sup>1</sup> This ruling is still consistent with the “whole complaint” approach of *Rubke* and  
27 its progeny, as it treats all claims and all defendants the same once the complaint is  
28 determined to allege fraud, or not.

1                   *In re Exodus Commc'ns., Inc. Sec. Litig.*, No. C 01-2661, 2005 WL  
2 1869289 (N.D. Cal. Aug. 5, 2005), on which Plaintiffs rely, does not suggest a  
3 different result under current law. In that case the court came to the conclusion  
4 that a “unified course of fraudulent conduct” had not been alleged for purposes of  
5 the Section 10(b) claim and Section 11 claim because “plaintiffs have made  
6 sufficiently clear their intent to assert two alternative **theories of liability** against  
7 the Underwriter Defendants based on misstatements in the Registration Statements:  
8 (1) a § 11 claim based on negligent or innocent misrepresentations or omissions, []  
9 and (2) a § 10(b) claim based on fraud.” *Id.* at \*12 (emphasis added). However,  
10 this type of “alternate theory” analysis has been specifically disapproved of by the  
11 Ninth Circuit. If the facts underlying both a § 10(b) and § 11 claim are the same,  
12 and the gravamen of those facts is fraudulent, then the entire complaint “sounds in  
13 fraud” not just the 10(b) claim. *See Rubke*, 551 F. 3d at 1161. As one California  
14 court recently put it: “It is the conduct pled that matters - not necessarily the words  
15 with which plaintiffs artfully seek to allege their claims...since the course of  
16 conduct pled in connection with plaintiffs’ section 11 claim is so substantively  
17 similar to the conduct pled in connection with plaintiffs’ section 10(b)  
18 claim...plaintiffs’ section 11 claim does, in fact, ‘sound in fraud.’” *In re Bare*  
19 *Escentuals, Inc.*, 2010 WL 3893622 at \*13 (N.D. Cal. Sept. 30, 2010); *see also*,  
20 *e.g. In re Metro. Sec. Litig.*, 532 F. Supp. 2d 1260, 1278 (E.D. Wash. 2007) (“A  
21 Section 11 plaintiff can not escape the requirements of Rule 9(b) by virtue of a  
22 general disclaimer that a claim is based on negligence rather than fraud”); *In re*  
23 *Infonet Servs. Corp. Sec. Litig.*, 310 F. Supp. 2d 1080, 1093-94 (C.D. Cal. 2003)  
24 (same); *In re Lantronix, Inc. Sec. Litig.*, 2003 WL 23198818, at \*9 (C.D. Cal. Dec.  
25 31, 2003) (same, “the pleading requirements of Rule 9(b) cannot be evaded simply  
26 by avoiding the use of that magic word.”).

27                   *In re Surebeam Corp. Sec. Litig.*, No. 03 CV 1721JM, 2005 WL  
28 5036360, at \*7 (S.D. Cal. Jan 3, 2005) is another case cited by Plaintiffs that does



1 not stand up under current Ninth Circuit law, and is inapposite and unhelpful.  
2 There, the court's decision to apply Rule 9(b) to Section 11 claims against other  
3 defendants and Rule 8(a) to claims against underwriter defendants appears to turn  
4 upon the fact that the underwriter defendants are "hardly mentioned" in the  
5 complaint. This is not the proper analysis under current law, where it is the facts  
6 underlying the claims themselves, against all defendants, that matters. If the  
7 gravamen of the facts underlying the complaint as a whole is fraudulent, then Rule  
8 9(b) applies to all claims against all defendants. *See Rubke*, 460 F. Supp. 2d at  
9 1161. *In re Countrywide Financial Corp. Sec. Litig.*, 588 F. Supp. 2d 1132, 1162-  
10 63 (C.D. Cal. 2008) and *In re JDS Uniphase Corp. Sec. Litig.*, No. C 02-1486,  
11 2005 WL 43463 at \*9, also cited by Plaintiffs in their Opposition, are just as  
12 unhelpful in assisting the Court's analysis as they fail to follow the "whole  
13 complaint" analysis now followed in the Ninth Circuit, particularly after *Rubke*.

14 No attempt is made in the CAC to allege different facts against the  
15 Underwriter Defendants than against the other Securities Act defendants. Instead,  
16 the Securities Act claims are made against "all defendants" and incorporate the  
17 entire series of factual allegations against all defendants. *See* CAC ¶283  
18 ("Plaintiff...incorporates by reference each and every allegation contained in  
19 Sections I-IV, X-XI and XIII-XIV above...against **all Defendants**..." (emphasis  
20 added)). And these facts, which form the basis for the Securities Act claims  
21 against **all defendants**, are exactly the same factual allegations as those supporting  
22 the Exchange Act claims. Plaintiffs carefully separate their factual allegations into  
23 a "factual background and substantive allegations relating to the exchange act  
24 claims" (CAC, ¶¶ 43-150) and a separate "factual background and substantive  
25 allegations relating to the securities act claims" (CAC, ¶¶ 235-275). However, the  
26 same "conduct" (i.e. their "gravamen") is contained in both: that there were false  
27 and misleading statements regarding a new "supply agreement" with EMC,  
28 STEC's largest customer for the ZeusIOPS Product (CAC, ¶¶46-82, 238-249); that

1 “Defendants” made false and misleading statements regarding other OEMs’  
2 increased orders of ZeusIOPS during the second half of 2009 (CAC, ¶¶ 83-100,  
3 253-255); that defendants made false and misleading statements regarding STEC’s  
4 revenues, by shipments of defective or unusable product (CAC, ¶¶ 102-108, 265-  
5 271); by shipments of product that had not been ordered by the customers (CAC,  
6 ¶¶ 109-115, 272-273), and by shipments of empty boxes (CAC, ¶¶ 116-120, 274-  
7 275).

8           Thus, just as in *Rubke*, here Plaintiffs “employ[] the exact same  
9 factual allegations to allege violations of [the Securities Act] as [they] use[] to  
10 allege fraudulent conduct under section 10(b) of the Exchange Act” and, thus, Rule  
11 9(b) applies to both sets of claims against all defendants. *Rubke*, 460 F. Supp. 2d  
12 at 1161. Plaintiffs’ “artful pleading,” by separating the facts supporting their  
13 Securities Act and Exchange Act claims into two separate sections in the CAC, and  
14 their inclusion of a disclaimer, does not allow them to avoid Rule 9(b)’s  
15 particularity requirements, given that the **facts themselves** are the same. *See Stac*,  
16 89 F. 3d at 1405 n.2; *see e.g. In re Bare Escentuals, Inc.*, 2010 WL 3893622 at \*13  
17 (where “obvious overlap” between factual allegations supporting Section 10(b) and  
18 Section 11 claims, “artful pleading” and disclaimer not relevant); *In re Metro*, 532  
19 F. Supp. 2d at 1278 (“a Section 11 plaintiff cannot escape the requirements of Rule  
20 9(b) by virtue of a general disclaimer that a claim is based on negligence rather  
21 than fraud”); *In re Levi Strauss & Co. Sec. Litig.*, 527 F. Supp. 2d 965, 979 (N.D.  
22 Cal. 2007) (Rule 9(b) applied to plaintiffs’ § 11 claims despite disclaimer, noting  
23 “although plaintiffs separate allegations supporting their § 11 claims from  
24 allegations supporting their § 10(b) claim, the § 11 allegations nevertheless  
25 reiterate the same alleged conduct and course of conduct which underlie the §  
26 10(b) claim.”); *In re White Elec. Designs Corp. Sec. Litig.*, 416 F. Supp. 2d 754,  
27 778 (D. Ariz. 2006) (Rule 9(b) applied to plaintiffs § 11 claims despite disclaimer).  
28 As one court in the Northern District recently put it: “It is the conduct pled that



matters - not necessarily the words with which plaintiffs artfully seek to allege their claims...since the course of conduct pled in connection with plaintiffs' section 11 claim is so substantively similar to the conduct pled in connection with plaintiffs' section 10(b) claim...plaintiffs' section 11 claim does, in fact, 'sound in fraud.'” *In re Bare Escentuals, Inc.*, 2010 WL 3893622 at \*13.

Consequently, because the “gravamen” of the conduct alleged in the CAC is a series of factual allegations “grounded in fraud” and those same facts form the basis of both Plaintiffs’ Exchange Act claims and their Securities Act claims against all Defendants, including the Underwriter Defendants, the entire complaint “sounds in fraud” and must be subject to the heightened pleading requirements of 9(b) with respect to all Defendants. Because, as described in the Motion to Dismiss and Reply filed by the STEC Defendants, the CAC does not meet the requirements of 9(b), and for the other reasons stated in the STEC Defendants’ moving papers, the CAC does not state a claim against the Underwriter Defendants and should be dismissed.

DATED: November 15, 2010

Bingham McCutchen LLP

By: /s/ John D. Pernick  
John D. Pernick  
Attorneys for Defendants  
Barclays Capital Inc., Deutsche Bank  
Securities Inc., J.P. Morgan Securities,  
Inc., and Oppenheimer & Co., Inc.